ESA BIN SA'YON

v.

WOON KIM POH & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
DATO HJ. ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 546 OF 1994]
16 APRIL 1995

CIVIL PROCEDURE: *Notice to show cause - Civil suit struck out for non-attendance of both parties - Whether action could be reinstated - Whether affidavit in support disclosed sufficient grounds - Whether plaintiff's claim could be struck out under the inherent jurisdiction of the Court - Whether plaintiff guilty of inordinate and inexcusable delay - Whether defendants prejudiced - Order 13, O. 18 r. 19, O. 19 r. 2(1), O. 24, O. 34, O. 92 r. 4 RHC 1980.*

The writ and statement of claim was issued on 6 September 1984. The 1st defendant's defence was filed on 8 October 1984. The 2nd defendant did not file defence. On 9 September 1984, the plaintiff obtained an *ex parte* injunction against the 1st defendant. An application to set aside the interim injunction was dismissed on 18 June 1985. On 2 December 1985, the plaintiff filed summons for directions pursuant to O. 25. On 20 September 1986, the action was set down for trial after an order for discovery and inspection was made on 11 December 1985. In 1987, both the plaintiff and the 1st defendant changed solicitors. On 14 July 1987, the 1st defendant's solicitors wrote to the Court requesting a hearing date. On 10 March 1988, they again wrote for an early hearing date.

By letter dated 22 February 1992, the Senior Assistant Registrar notified all parties that the case would be mentioned on 3 March 1992. On 16 April 1992, the Court was informed that the 1st defendant had died and the matter was adjourned *sine die.* A notice to show cause was issued on 16 May 1994 and on 3 June 1994, the Court was told that the 1st defendant had died and that the plaintiff was discussing with his widow. Another date was given on 21 July 1994 but the case was struck off when both parties did not attend.

On 3 August 1994, the plaintiff filed summons in chambers to reinstate the action on the ground that on 21 July 1994, the plaintiff's Counsel was in Court but left the Court room with the Senior Assistant Registrar at the learned Judge's request to check another Court file. In her absence this action was called and struck out.

The issues were (i) whether the application to reinstate the action was supported by sufficient grounds (ii) whether on a notice to show cause, the Court could examine pleadings to determine whether the statement of claim

disclosed no reasonable cause of action (iii) whether the plaintiff was guilty of inordinate and inexcusable delay in prosecuting his claim and whether serious prejudice was caused to the defendants.

Held:

[1] The affidavit in support of the application to reinstate did not contain sufficient material to enable the Court to exercise its discretion to reinstate. The affidavit of the Senior Assistant Registrar was not filed to support the plaintiff's Counsel's allegation. No steps had been taken to amend the writ either.

[2] In the exercise of its discretion whether or not to reinstate the present case, the Court is also vested with a discretion to strike out the plaintiff's claim under and in exercise of the inherent jurisdiction of the Court. The Court can determine whether the statement of claim discloses no reasonable cause of action even in a notice to show cause so as to prevent injustice under O. 92 r. 4 RHC.

[3] The plaintiff did not enter final judgment against the 2nd defendant even though defence was not filed. The plaintiff and the 1st defendant did not comply with the order for discovery and inspection. The plaintiff became complacent when the interim injunction against the 1st defendant was confirmed till trial. No steps were taken by the plaintiff to amend the writ or to revive the case when it was adjourned *sine die*. The Court was not informed about the discussions between the plaintiff and the 1st defendant's widow. The long delays were not explained in the affidavit. Therefore there was inordinate and inexcusable delay on the part of the plaintiff.

[4] The lapse of time and the death of the 1st defendant would have a great impact on the memory of witnesses causing a risk of prejudice against the defendants.

[Application to reinstate dismissed]

Cases referred to:

Tractors Malaysia Bhd. v. Tio Chee Hing [1975] 2 MLJ I PC ***(cit)***

Cadam v. Beaverbrook Newspapers Ltd. [1959] 1 QB 413 ***(cit)***

Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman & Ors. [1987] 2 MLJ 633 ***(cit)***

Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. [1984] 2 MLJ 105 PC ***(cit)***

Pertamina v. Kartika Ratna Thahir & Ors. [1983] 1 MLJ 136 ***(cit)***

New Straits Times Malaysia Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. [1984] 2 CLJ 285; [1985] 1 MLJ 227 ***(refd)***

Pacific Centre v. United Engineers (M) Bhd. [1984] 2 MLJ 243 ***(cit)***

Sim Seoh Beng & Anor. v. Koperasi Tunas Muda [1995] 1 CLJ 491; [1995] AMR 10:501 ***(cit)***

United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd. [1968] 2 MLJ 85 ***(cit)***
Bright Navigation Co. Ltd. v. 'Eishen Maru' [1988] 1 MLJ 482 ***(cit)***
Loo Chay Meng v. Ong Cheng Hoe [1990] 1 MLJ 445 ***(cit)***
Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd. [1992] 4 CLJ 1922; [1992] 2 MLJ 434 ***(cit)***
Alfred Dunhill Ltd. v. Sunaptic SA [1979] FSR 337 ***(foll)***
Allen v. Sir Alfred Mc Alpine & Sons Ltd. [1968] 2 QB 229 ***(foll)***
Birkett v. James (1978) AC 297 ***(foll)***
United Malayan Banking Corporation Berhad v. Palm & Vegetable Oil [1994] 3 CLJ 144; [1994] 3 MLJ 73 SC ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 13, 18 r. 19, 19 r. 2(1), 24, 34, 92 r. 4

Other sources referred to:
The Supreme Court Practice 1995, Vol. 1, para 25/1/4, p. 472

JUDGMENT

Abdul Malik Ishak J:

My immediate predecessor heard the notice to show cause (Enclosure 66) on 3 June 1994 and he was again told that the first defendant had died and that the plaintiff was discussing with the widow of the first defendant. Another date was given and this was on 21 July 1994. Unfortunately, on 21 July 1994 when the case came up again for mention no one turned up and my immediate predecessor promptly struck out the civil suit. The plaintiff filed an application by way of a summons-in-chambers (Enclosure 69) on 3 August 1994 to reinstate the action and that the costs of the application be costs in the cause. The application was supported by the affidavit of Vasumathi Thandayuthapani, an advocate and solicitor of the High Court of Malaya practising as a legal assistant in the legal firm of Messrs K Sila Dass and Partners, affirmed on 30 July 1994 (Enclosure 68). Enclosure 69 was scheduled for hearing on 27 September 1994 before the Senior Assistant Registrar but somehow the Senior Assistant Registrar adjourned the matter to 28 November 1994, and fixed before me on 10 April 1995. On that day, after hearing submissions of Counsel for the plaintiff, I dismissed without costs the application in Enclosure 69.

Vasumathi deposed in her affidavit (Enclosure 68) that on 21 July 1994 she had instructions from Messrs K Sila Dass and Partners to mention two matters for them before the High Court and these two matters were Civil Suits numbers 546 of 1984 (it is the subject matter of the present case) and 264 of 1983. She deposed that Civil Suit number 264 of 1983 was listed as number 2 on the cause list whilst the present case was number 5 on the cause list. She further deposed that when Civil Suit number 264 of 1983 was called up in open Court, my immediate predecessor had requested her to leave the Court room with the then Senior Assistant Registrar to check on the Court file to ascertain some matters and it was at this time and in her absence that the

present case was called up in open Court and as nobody appeared my immediate predecessor had struck off the present case. Finally, she deposed that her absence in open Court, at the material time, was not intentional nor was it meant to disrespect the Court as she was engaged with the then Senior Assistant Registrar. These were the grounds relied upon by the plaintiff for reinstatement of the present case.

It is now trite law that the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution (per Lord Diplock in *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1 PC), and only in obvious cases (*Cadam v. Beaverbrook Newspapers Ltd.* [1959] 1 QB 413 at 424].

An application for striking out is made by way of summons-in-chambers and such application should be made promptly *(Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman & Ors.* [1987] 2 MLJ 633), and preferably as soon as possible after the offending pleading is served. A pleading may be struck out on the grounds that (see O. 18, r. 19 of the Rules of the High Court, 1980 ("RHC")):

(a) it discloses no reasonable cause of action or defence; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court.

All the reported cases on O. 18, r. 19 of the RHC emphasised again and again that so long as the statement of claims disclosed some grounds of action the need to strike them out would not arise even though the plaintiffs are unlikely to succeed at the trials (see for examples the cases of *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd.* [1984] 2 MLJ 105 PC, and *Pertamina v. Kartika Ratna Thahir & Ors.* [1983] 1 MLJ 136.

In *New Straits Times Malaysia Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 MLJ 227, Mohamed Azmi FJ said of O. 18 r. 19(1)(a) of the RHC in the following terms:

> It is therefore clear law that in an application to strike out pleadings under O. 18 r. 19 (1)(a), no evidence shall be admissible, and the Court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the Court is prepared to say that the cause of action or the defence is obviously unsustainable.

Since the facts in this case were not on the basis of an application under O. 18 r. 19 of the RHC but rather it started off with a notice to show cause as to why the civil suit ought not to be struck off, the question which arises is this: Can this Court proceed to examine the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence? It would be prudent for this Court to proceed on these lines even in a notice to show cause so as to prevent injustice (O. 92, r. 4 of the RHC; *Pacific Centre v. United Engineers (M) Bhd.* [1984] 2 MLJ 243; *Sim Seoh Beng & Anor. v. Koperasi Tunas Muda etc* [1995] AMR 10:501). In my judgment, O. 92, r. 4 of the RHC is applicable in a variety of situations and circumstances - it being an overriding provision in the RHC *(United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ 85; *Bright Navigation Co. Ltd. v. 'Eishen Maru'* [1988] 1 MLJ 482; *Loo Chay Meng v. Ong Cheng Hoe* [1990] 1 MLJ 445; *Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd.* [1992] 2 MLJ 434. I cannot say with certainty that my immediate predecessor must have done just that when he struck out the present case on 21 July 1994. There was no written judgment and I cannot speak for him.

Be that as it may, the issue before me now is the question of reinstatement of the present case and for the purpose of this judgment I need only consider the contents of Vasumathi's affidavit that was affirmed on 30 July 1994 and nothing else. If it was true that my immediate predecessor had ordered Vasumathi to go out of the Court room with the then Senior Assistant Registrar to check the Court file as alleged, why was the affidavit of the then Senior Assistant Registrar not enclosed herein to support that allegation, after all the then Senior Assistant Registrar is still in the Government service and he is currently holding the post of deputy public prosecutor in Johor Bahru. Is it too much to ask in exchange for reinstatement of the present case? Incidentally, Vasumathi's affidavit did not advert to the death of the first defendant nor to the discussions between the plaintiff and the widow of the first defendant and these facts as recited in the early part of this judgment were obtainable upon perusal of the endorsements which appeared on the file cover of the present case. If the first defendant had died what steps had been taken by the plaintiff to amend the writ? Vasumathi's affidavit did not contain sufficient material for me to exercise my judicial discretion to reinstate the present case. I have said elsewhere that affidavits play a crucial role in interlocutory proceedings and in every application in chambers as submissions and decisions are invariably based on them. The basic rules of affidavit practice are contained in O. 41 of the RHC. Special care should be paid while drafting affidavits. As Roskill LJ, said in *Alfred Dunhill Ltd. v. Sunaptic SA* [1979] FSR 337:

> Draftsmen of affidavits should not as a general rule, put into the mouths of the intended deponent legal arguments of which those deponent are unlikely ever to have heard.

The present case is an old case. The plaintiff issued the writ and statement of claim against the defendants on 6 September 1984 and the statement of defence of only the first defendant was filed on 8 October 1984. The second defendant appeared to be passive as I could not locate their statement of defence in the Court file. Messrs Subra Naicker & Co. for the second defendant found it difficult to file the statement of defence on behalf of the second defendant as no instructions were forthcoming and, consequently, they were forced to file summons for withdrawal (Enclosure 51) supported by, an affidavit of Sonia Dayanandan, an advocate and solicitor, affirmed on 11 March 1987 (Enclosure 51A). An order to that effect was made (see Enclosure 59). Though Messrs Rajasooria Son & Proctor by letter dated 10 March 1988 (Enclosure 64) informed the then Judge's secretary that the present case was set down for trial on 23 October 1986 and that they had yet to receive a notification of the hearing date and had enquired as to the possibility of getting an early hearing date yet the present case still did not go on for trial. Such delay must be the cause and effect of the notice to show cause as reflected in Enclosure 66.

It is germane to mention that procedural rules formulated by the Rules Committee confer on the Courts a very wide discretion as to whether to strike out an action or otherwise. Speaking in general terms, the backlog of cases in the Courts may be due to the delay in the prosecution of actions by the plaintiffs as against the defendants. In the present case, the plaintiff must have known that the second defendant has yet to file their statement of defence but the plaintiff was complacent and did not proceed under O. 19, r. 2(l) of the RHC, to enter final judgment against the second defendant. From the Court file, there was an order after the close of the pleadings in regard to the discovery by the parties to the action of the documents and there was also an order that there be discovery by exchanging a list of documents (O. 24 of the RHC) but these orders were not complied with. I think there are sufficient rules in the RHC, like O. 13 (default of appearance): Order 19 (default of defence); and O. 24, r. 16 (failure to comply with an order for inspection or discovery), which would provide the plaintiff here with the necessary reliefs to either proceed with the action, enter judgment against the second defendant or have the defence of the first defendant to be struck off. The options were always open to the plaintiff. It would not be incorrect to say that the rules of the Court impose an onerous duty on the plaintiff to get the machinery moving for an early disposal of the plaintiff's claim. The same is not true for the defendants. The judicial process will not come to a stand still just because the defendants have not taken the necessary steps under the RHC. On the contrary, under the RHC it is always the plaintiff that has to take all the necessary steps to prosecute the action.

It goes without saying that in the exercise of my discretion not to reinstate the present case, I am vested also with a discretion to strike out the plaintiff's claim under and in exercise of the inherent jurisdiction of the Court. The principles applicable in the exercise of the Court's discretion to strike out the plaintiff's claim under O. 34 of the RHC are the same as in the case of the exercise of the inherent jurisdiction of the Court to strike out the plaintiff's claim. That this is so is clearly reflected in *The Supreme Court Practice* 1995, volume 1, para 25/1/4, at p. 472, where it is stated that:

> Generally speaking the same principles are applied whether the Court is acting under its express power (under the Rules of the Supreme Court) or under its inherent jurisdiction.

The decision of the Court of Appeal in Allen *v. Sir Alfred Mc Alpine & Sons Ltd.* [1968] 2 QB 229, which was approved by the House of Lords in *Birkett v. James* [1978] AC 297, show a singular trend and that is this. That the judgment of the High Court has a discretionary power to strike out an action for want of prosecution in the following situations:

(1) where the default has been intentional and contumelious; or

(2) where the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim; and

(3) that such delay gives rise to a substantial risk that is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the defendant.

See also the recent decision of the then Supreme Court in *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oil* [1994] 3 MLJ 73 SC, where the law was lucidly restated in the same vein.

In the context of the present case, I need only consider the question of inordinate delay and the prejudice to the defendant before exercising my discretion to strike out the plaintiff's claim for want of prosecution.

To recapitulate, the writ and the statement of claim were issued on 6 September 1984, while the statement of defence of the first defendant was filed on 8 October 1984. The second defendant has yet to file their statement of defence. Since Vasumathi's affidavit in support of the application for reinstatement contained precious little, I had no choice but to peruse the whole file that would entail all the documents found in the Court file and the endorsements on the file cover in an obvious attempt to do justice to the parties. The details are as follows. On 8 September 1984 by an *exparte* summons-in-chambers, the plaintiff successfully applied before Shankar J, (now CAJ), who gave the following orders on 9 September 1984 (Enclosure 7):

(1) that the first defendant be restrained from dealing with land held under EMR 831 for Lot 2111, in the Mukim of Pontian, District of Johor Bahru until disposal of the action or further order;

(2) that a copy of the order be served upon the defendants and upon the Collector of Land Revenue Mukim of Pontian;

(3) that the defendants or either of them be at liberty to apply to set aside this order. Such application to be made within three (3) weeks of the date of the service of this order;

(4) costs in the cause; and

(5) plaintiff has given usual undertaking as to damages

On 15 September 1984 by an oral application under O. 20, r. 11 of the RHC, the same Judge amended the "District of Johor Bahru" appearing to the title of the land to read "District of Pontian" (see the amended Order for interim injunction at Enclosure 11).

On 11 October 1984, the first defendant filed a summons-in-chambers (Enclosure 17) to set aside the interim injunction that was granted on 9 September 1984. The application was supported by an affidavit of the first defendant affirmed on 18 September 1984 (Enclosure 18). The plaintiff filed an affidavit affirmed on 25 October 1984 (Enclosure 25) challenging Enclosure 17. Shankar J, (now CAJ), heard Enclosures 17, 18 and 25 on 27 October 1984 and reserved judgment until 18 June 1985 (Enclosure 27) where he decided in favour of the plaintiff (see the order of the Court dated 18 June 1985 in Enclosure 33).

On 2 December 1985, the plaintiff filed summons for directions pursuant to O. 25 of the RHC (Enclosure 36). On 20 September 1986, the plaintiff filed a request for setting down action for trial (Enclosure 39) and the requisite documents pursuant to O. 34, r. 3 of the RHC were enclosed therein. On 20 September 1986, the plaintiff filed a notification for setting down action (Enclosure 40). The plaintiff filed his bundle of pleadings in Enclosure 4l, where he exhibited only the writ and the statement of claim of the plaintiff and the statement of defence of the first defendant. It is appropriate to mention here that by Enclosure 23, Messrs Subra Naicker & Co., filed a memorandum of appearance for the second defendant on 7 October 1984. Next, on 11 December 1985 by an order in chambers of the then Senior Assistant Registrar (not the same Senior Assistant Registrar that gave the order dated 27 September 1994), the plaintiff was ordered to serve within 14 days on the defendant (unclear whether it referred to the first defendant or the second defendant) a list of documents and file an affidavit verifying such list and the defendant too (again unclear whether it referred to the first defendant or the second defendant) was ordered to serve within 14 days to the plaintiff a list

of documents and file an affidavit verifying such list and it was further ordered that there be inspection of documents within 14 days of the service of the list and it was also ordered that the action be set down for trial within 60 days and that the costs of the application be costs in the cause (see Enclosure 48).

As stated in the early part of this judgment, Messrs Subra Naicker filed a summons for withdrawal (Enclosure 51) dated April, 1987 and by the order of the then Senior Assistant Registrar dated 22 April 1987 (Enclosure 59) Messrs Subra Naicker ceased to act for the second defendant.

By notice of change of solicitors at Enclosure 53 dated 5 May 1987, the plaintiff changed his previous solicitors Messrs Ghazali Ariff & Partners to Messrs K Sila Dass & Co. (see Enclosure 53). The first defendant too changed his solicitors from Messrs Muthu & Co. to Messrs Rajasooria, Son & Proctor in 1987 (the exact date not known, see Enclosure 56).

By letter dated 14 July 1987 (Enclosure 60), Messrs Rajasooria, Son & Proctor acting for the first defendant wrote a letter to the Senior Assistant Registrar enquiring as to when the date of hearing would be fixed. Again, by letter dated 10 March 1988 (Enclosure 64), Messrs Rajasooria, Son & Proctor acting for the first defendant wrote a letter to the then Secretary of the then resident High Court Judge and in that letter it was stated that though the suit was set down for trial on 23 October 1986 they had yet to receive a notification of the hearing date and they enquired into the possibility of getting an early hearing date (Enclosure 64 has been referred to in the early part of this judgment). It is pertinent to mention that the Court file does not show whether the Court sat on 23 October 1986.

By letter dated 22 February 1992, the Senior Assistant Registrar informed all parties concerned that the case would be mentioned on 3 March 1992 and from the Court file the case was mentioned before the High Court Judge where another date for mention was fixed and this was on 16 April 1992. Finally, on 16 April 1992 the High Court was told that the first defendant had died and promptly the matter was adjourned *sine die*.

The case remained in abeyance until 16 May 1994 where the notice to show cause was issued by the then Senior Assistant Registrar (Enclosure 66) and the date for mention of that notice to show cause was fixed on 3 June 1994.

From the chequered history of the case as illustrated above, several observations can be made.

Firstly, even though the second defendant did not file their statement of defence the plaintiff saw it fit not to enter final judgment against the second defendant.

Secondly, the plaintiff did not serve the list of documents at all to the first defendant and neither did the latter serve their list of documents to the plaintiff even though the Senior Assistant Registrar made orders to that effect on 11 December 1985. Thirdly, the plaintiff became complacent when they succeeded in restraining the first defendant to deal with the land until final disposal of the hearing of the case. Fourthly, though the plaintiff knew that the first defendant had died he did not take the necessary steps to amend the writ. Fifthly, when the case was adjourned *sine die* the plaintiff became even more complacent and failed to take steps to revive the case. Finally, this Court was not told as to the outcome of the discussions between the plaintiff and the widow of the first defendant.

Two years had passed (to be exact 2 years one month and 17 days) after the Court was told that the first defendant had died before the notice to show cause was heard by my immediate predecessor (16 April 1992 to 3 June 1994). There was a further delay of more than 9 years (to be exact 9 years 10 months 15 days) from the time the writ and the statement of claim were filed (6 September 1984) to the time my immediate predecessor struck out the present case (21 July 1994). These delays were not even explained by Vasumathi in her affidavit. I cannot venture on mere conjectures for the plaintiff"s sake. I was therefore satisfied that there was inordinate and inexcusable delay on the part of the plaintiff to prosecute the present case.

Prejudice

The risk of prejudice would be sufficient to make the fair trial of the present case impossible. Between 6 September 1984 and 4 April 1995, there was a long delay of 10 years 7 months 4 days before the application for reinstatement was heard by me. The effect of the lapse of time would have a great impact on the memory of witnesses and more so if one were to accept that the first defendant had died even though this fact was not adverted to by Vasumathi in her affidavit - all these would surely add a new complexion not only to the plaintiff's case but also that of the first defendant. Be that as it may, for the reasons aforesaid I felt that the present case should not be reinstated and I so ordered accordingly. There was no order as to costs.

Reported by L Nagarajan